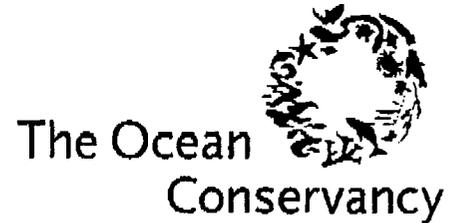


*Advocates for Wild, Healthy Oceans*

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June 1, 2004

Donna Wieting  
Chief, Marine Mammal Conservation Division  
Office of Protected Resources  
National Marine Fisheries Service  
1315 East-West Highway  
Silver Spring, MD 20910



RE: Authorization for Commercial Fisheries Under the Marine Mammal Protection Act of 1972; Zero Mortality Rate Goal, 69 Fed. Reg. 23477 (April 29, 2004)

Dear Ms. Wieting:

The Ocean Conservancy appreciates the opportunity to comment on NMFS' Proposed Rule to set the levels of incidental mortality and serious injury that would satisfy the goal of insignificant levels approaching a zero rate for all commercial fisheries. The Ocean Conservancy has been a key player in the development and implementation of the provisions within the Marine Mammal Protection Act (MMPA) that govern the incidental take of marine mammals in commercial fishing. As a participant on all existing take reduction teams, The Ocean Conservancy strongly supports the proposed threshold of 10% of the potential biological removal level (PBR) as the most effective means to meet the zero mortality rate goal (ZMRG) of the MMPA.

### Background

The Marine Mammal Protection Act (MMPA) requires that "...it shall be the immediate goal that the incidental kill or incidental serious injury of marine mammals permitted in the course of commercial fishing operations be reduced to insignificant levels approaching a zero mortality and serious injury rate"— a provision that is typically referred to as the zero mortality rate goal (ZMRG). 16 U.S.C. § 1371(a)(2). In 1994, Congress further maintained and refined the ZMRG, providing target dates within the provisions which govern the taking of marine mammals in the course of commercial fisheries, stating, "In any event it shall be the immediate goal that the incidental mortality or serious injury of marine mammals occurring in the course of commercial fishing operations be reduced to insignificant levels approaching a zero mortality and serious injury rate within 7 years after April 30, 2004." 16 U.S.C. § 1387(a)(1). Congress also mandated that

Comments of The Ocean Conservancy  
June 1, 2004  
Zero Mortality Rate Goal

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“[c]ommercial fisheries shall reduce incidental mortality and serious injury of marine mammals to insignificant levels approaching a zero mortality and serious injury rate within 7 years after April 30, 2004.” 16 U.S.C. § 1387(b)(1).

The MMPA mandates that the long-term goal of a take reduction plan shall be “to reduce, within 5 years of its implementation, the incidental mortality or serious injury of marine mammals incidentally taken in the course of commercial fishing operations to insignificant levels approaching a zero mortality and serious injury rate, taking into account the economics of the fishery, the availability of existing technology, and existing State or regional fishery management plans.”<sup>1</sup> 16 U.S.C. § 1387(f)(2).

On June 16, 1995, 60 Fed. Reg. 31666, NMFS proposed regulations to implement Section 118 of the MMPA, 16 U.S.C. § 1387. In that proposed rule, NMFS stated that a fishery could be classified a Category III fishery and have satisfied the requirements of ZMRG in one of two ways, if a commercial fishery causing incidental mortality and serious injury of marine mammals is one that collectively with other fisheries is responsible for the annual removal of “ten percent or less of any marine mammal stock’s potential biological removal level, or more than 10 percent of any marine mammal stock’s potential biological removal level, yet that fishery by itself is responsible for one percent or less that stock’s potential biological removal level.” 60 Fed. Reg. at 31671. *See also* 50 C.F.R. § 229.2. “The definition of the ZMRG in the [1995] proposed rule was related to proposed regulations for classifying fisheries so that only those fisheries that had achieved insignificant levels of incidental mortality and serious injury would be in Category III.” 68 Fed. Reg. at 40890.

The Ocean Conservancy (then the Center for Marine Conservation) strongly supported the quantitative benchmarks proposed in 1995, especially those defining ZMRG as 10% of PBR. We did and continue to believe this approach is:

- Familiar to NMFS' constituents because this definition was proposed in the 1995 proposed rule implementing section 118 of the MMPA, 60 Fed. Reg. 31666 (June 16, 1995).
- Easy to calculate and explain because it is based on the well understood PBR equation; and
- Consistent with the current definition for a Category III fishery, such that the List of Fisheries would provide an easy metric for which fisheries have met Tins.

*See* 68 Fed. Reg. at 40891.

We concur with NMFS' statement that, “This quantified, stock-specific level of mortality and serious injury is relatively easy to calculate, is based on information available in the SARs, and is based on the formula that NMFS currently uses to implement this statutory phrase for purposes

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<sup>1</sup> 16 U.S.C. § 1386(a)(6) requires the generation of a potential biological removal level (PBR) for all marine mammal stocks. 16 U.S.C. § 1362(20) defines PBR as the “maximum number of animals, not including natural mortalities, that may be removed from a marine mammal stock while allowing that stock to reach or maintain its optimum sustainable population.”

of the SARs. Therefore, this quantified, stock-specific level should provide commercial fishing operations with an easily understandable level of mortality and serious injury as a target to provide incentive to improve fishing technology and practices to reduce incidental mortality and serious injury and provide an effective means to meet the ZMRG of the MMPA." 69 Fed. Reg. at 23485. Further, we agree with NMFS's proposal to use this threshold "in part to avoid confusion that would result by changing from its use in SARs since 1995." 69 Fed. Reg. at 23483. Consequently, The Ocean Conservancy supports the proposed threshold of 10% of PBR as the most effective means to meet the ZMRG of the MMPA.

## INSIGNIFICANCE THRESHOLD

The Ocean Conservancy strongly supports the insignificant threshold of 10 percent of PBR.

First, The Ocean Conservancy believes this threshold is suitably protective of endangered species and is consistent with the requirements in section 118(f)(2) of the MMPA, 16 U.S.C. § 1387(f)(2), for a short-term goal of reducing incidental mortality and serious injury to levels less than PBR and a long-term goal of insignificant levels approaching a zero mortality and serious injury rate. The recovery factor of 0.1 in the PBR equation is only used for endangered species, species for which every precaution should be taken to eliminate incidental mortality and serious injury in commercial fishing operations and promote the recovery of these species. Until 1994, the MMPA prohibited the taking of depleted marine mammal stocks in the course of commercial fishing.<sup>2</sup> In light of that prohibition, setting the ZMRG at levels that further reduce marine mammal incidental mortality and serious injury from the PBR level will likely ensure the recovery of endangered species while still allowing commercial fishing operations to continue. In our opinion, this approach to ZMRG is the most precautionary for endangered species, seems highly defensible, and not overly restrictive.

Second, we are pleased that NMFS is aware of the logistic model's limits and application to small and declining populations. Using an insignificance threshold that is based upon the PBR equation is subject to the same limitations and assumptions that are found in the PBR calculations, and the underlying theory of the logistic model has crucial assumptions that are not necessarily valid for declining stocks. The PBR approach based upon the logistic model indicates that populations should grow if mortality is below sustainable levels. As NMFS noted, "In the case of Steller sea lions, Western U.S. stock; northern fur seals, Eastern North Pacific stock; and Hawaiian monk seals, the populations are declining, and known human-caused mortality and serious injury are insufficient to cause the decline." 69 Fed. Reg. at 23489. In these cases, The Ocean Conservancy fully supports NMFS' proposal to reduce the insignificance threshold to estimate an upper limit to the level of mortality and serious injury that could be considered insignificant. The proposed insignificance threshold would increase the level of protection as a stock's status deteriorates. But strictly calculated, this precaution may not provide the necessary level of protection, thus The Ocean Conservancy supports making an adjustment to the simple calculation for declining or small populations.

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<sup>2</sup> In *Kokechik Fishermen's Assoc. v. Secretary of Commerce*, 839 F.2d 795 (D.C. Cir. 1988), the court found that NMFS could not allow the taking of marine mammals without first determining whether or not the population of each species was at the optimum sustainable population level. *Id.* at 802.

## **OTHER ISSUES ADDRESSED IN THE PROPOSED RULE**

### **Provisions available under the MMPA for NMFS to meet the ZMRG**

The MMPA directs NMFS to develop and implement a Take Reduction Plan (TRP) in cases where a strategic stock (threatened, endangered, or depleted stocks or stocks for which human-caused mortality exceeds the calculated PBR) interacts with a Category I or II fishery and cases where a non-strategic stock interacts with a Category I fishery which NMFS determines has a high level of mortality and serious injury across a number of such stocks. "The MMPA contains no provisions for NMFS to develop and implement a TRP to reduce mortality and serious injury of non-strategic stocks of marine mammals incidental to Category II fisheries." 69 Fed. Reg. at 23478. The Ocean Conservancy agrees and urges NMFS to examine and devise mechanisms to reduce the bycatch from those fisheries for which the current Act does not require TRPs. Such mechanisms could potentially include periodic reports to Congress on the progress of these fisheries in meeting ZMRG and the development and implementation of bycatch reduction measures. Towards that end, NMFS should take immediate steps to partner with the conservation community and the fishing industry to conduct workshops to explore the feasibility of transferring existing technologies that have been deemed successful in reducing marine mammal bycatch in other fisheries to these fisheries and investigate new technologies to reduce bycatch.

### **Approaching Zero**

NMFS concludes that the phrase "approaching a zero mortality and serious injury rate" modifies the term "insignificant level" and does not create a stand-alone independent second criterion." 69 Fed. Reg. at 23485. The Ocean Conservancy believes that a single definition for "insignificant levels approaching a zero mortality and serious injury rate" is sufficient and that 10 percent of the PBR is the most appropriate definition because it is a level approaching a zero mortality and serious injury rate which will not have effects at a population level. However, in large or increasing populations, even when the incidental mortality and serious injury has been reduced to the insignificance threshold, that number may still be quite large. For example, the PBR of California sea lions is 6,591 animals, the ZMRG then would be 659 animals. While this level of mortality and serious injury incidental to commercial fishing operations is insignificant and can be tolerated at the population level by California sea lions, The Ocean Conservancy believes that NMFS and the fishing industry should do everything possible to further reduce the mortality and serious injury of individual marine mammals to the lowest level practicable, levels that more closely approach zero.

### Available Technology And Economic Feasibility

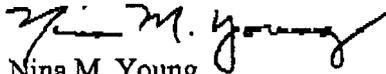
NMFS notes in the preamble to the Proposed Rule that it "is not proposing consideration of technology and economics as part of the insignificance threshold. However it will be necessary to take technology and economic feasibility into account in developing and implementing TRPs to reduce mortality toward the insignificance threshold." 69 Fed. Reg. at 23487. The Ocean Conservancy agrees that this is the proper way to account for economic and technological feasibility and that the setting of the insignificance threshold itself allows no room for balancing. Importantly, as NMFS observes, "section 118(b) [which implements ZMRG] does not include any language regarding consideration of technological or economic feasibility." 69 Fed. Reg. at 23487. It is only in 118(f), which discusses the requirements of Take Reduction Plans, that such considerations come into play.

Given this legislative structure, it is clear that NMFS obligation is to ensure that takes of all marine mammal species meet a biologically rather than economically and technologically based insignificance threshold. The insignificant threshold is the driving mechanism to reduce mortality and serious injury and the incentive for fishermen and scientists to devise economically feasible technologies to meet this objective. If given a clear goal, experience has demonstrated that take reduction teams can work cooperatively to devise the necessary technologies and secure the funds to implement those technologies, despite objections by the fishing industry that those technologies were nonexistent or economically infeasible. Furthermore, NMFS should encourage continued reduction of incidental mortality and serious injury through incentive programs and working with the fishing industry to improve available technologies and methods.

### **CONCLUSION**

The Ocean Conservancy supports the 10% of PBR as the insignificance threshold and believes that this standard should be the goal to drive the development of economically feasible technologies. We urge NMFS to finalize its Proposed Rule.

Sincerely



Nina M. Young  
Director Marine Wildlife Conservation Program